No. 17-1307

In The Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* COLORADO MORTGAGE LENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a law firm that initiates a non-judicial foreclosure to enforce a security interest under Colorado law thereby engages in debt collection for purposes of the Fair Debt Collection Practices Act.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Colorado M.B.A. d/b/a Colorado Mortgage Lenders Association (CMLA) respectfully submits this brief *amicus curiae* in support of Respondent McCarthy & Holthus LLP.[1]

CMLA is a non-profit, tax-exempt corporation organized under the laws of the State of Colorado for the purpose of supporting mortgage lenders in Colorado. CMLA has not participated in other cases before this Court.

CMLA considers this case to be of special significance in that it concerns the application of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (FDCPA) to the distinctive form of non-judicial foreclosure activity governed by Colorado State law. CMLA members, through their counsel in Colorado, utilize the Colorado non-judicial foreclosure procedure to recover collateral that has been pledged as security for mortgage loans when there is a default under the terms of Colorado mortgage loan documents. As an organization whose members rely on the Colorado non-judicial foreclosure process and whose members have

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to its preparation or submission.

been involved with the frequent and extensive revisions to the Colorado foreclosure statutes, CMLA has first-hand knowledge of the Colorado procedure and its many benefits. CMLA seeks to clarify the frequent misunderstandings and resulting inaccurate descriptions of the Colorado non-judicial foreclosure process in Petitioner's brief and the *amici* briefs filed in support of Petitioner and to highlight the provisions of the Colorado non-judicial procedures that support the Respondent's position.

SUMMARY OF ARGUMENT

FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. In defining "debt collector," the FDCPA distinguishes between entities that primarily engage in "the collection of any debts," and entities that primarily engage in the "enforcement of security interests." 15 U.S.C. § 1692a(6). Entities that engage in the collection of any debts are "debt collectors" subject to the FDCPA for all purposes. Entities that primarily engage in the enforcement of security interests are only subject to FDCPA when specific conduct outlined at 15 U.S.C. § 1692f(6) is at issue. However, the conduct identified in 15 U.S.C. § 1692f(6) is not at issue here. The question presented in this case is whether a law firm enforcing a security interest by initiating a non-judicial foreclosure absent any factors listed in section 1692f(6) with limited judicial involvement and without a monetary judgment constitutes debt collection

under the FDCPA requiring the law firm to comply with FDCPA.

The answer to the question presented in this case is "no." A non-judicial foreclosure, by its very nature, does not constitute debt collection under the FDCPA as it is enforcing a security interest and recovering collateral as opposed to debt collection. *Diessner v. Mortgage Electronic Registration Systems*, 618 F.Supp.2d 1184, 1198 (D. Ariz. 2009), affirmed, 384 Fed. Appx. 609, 2010 WL 2464899. A consumer has no obligation to pay any money in a non-judicial foreclosure. Colorado's unique public trustee foreclosure system has a long history of providing a fair and efficient system for facilitating foreclosures in Colorado. Under the Colorado statutory scheme, the lawyers representing the holders of evidences of debt do not demand payment from borrowers and do not obtain a monetary judgment through the process. When lawyers representing the holders of evidences of debt in Colorado are handling non-judicial foreclosures in accordance with Colorado law, they are representing their clients in the enforcement of security interests and therefore, they are not debt collectors under the FDCPA.

Foreclosure is clearly a matter of state law, evidenced by the 51 separate foreclosure laws in place in the various states and District of Columbia. Had Congress wanted a national foreclosure scheme, it would have constructed one; instead it has affirmatively avoided conflicts with the state law structures regarding foreclosures. The public trustee non-judicial foreclosure system is peculiar to Colorado. Requiring

law firms in Colorado handling non-judicial foreclosures to abide by FDCPA where it is not mandated by Congress would make it impossible for the lawyers to comply with certain notices required under Colorado law that are designed for the benefit and protection of the consumer. Additionally, it would serve as a federal mandate that all foreclosures throughout the country must be handled judicially, despite the clear preference of Colorado for its public trustee foreclosure system and other states' preference for their non-judicial foreclosure procedures. Absent any clear and manifest intent from Congress to implement such a national foreclosure system one cannot be directed through a misconstrued interpretation of the FDCPA as Petitioner argues. Further, public policy favors non-judicial foreclosure as it results in faster recovery after an economic crisis and an increase in home values.

The court below was correct in holding that Respondent was not acting as a debt collector within the definition of FDCPA when it commenced a non-judicial public trustee foreclosure pursuant to Colorado law. Respondent utilized the public trustee foreclosure process pursuant to Colorado law, never demanded payment from the Petitioner and did not pursue a monetary judgment against the Petitioner. Respondent sought only to enforce a security interest and thereby recover the collateral the Petitioner pledged as security to the lender when he borrowed the funds and consented to the public trustee foreclosure process. Thus, according to its clear language, FDCPA does not apply.

For these reasons, this Court should affirm the Tenth Circuit's decision.

I. HISTORY OF THE COLORADO PUBLIC TRUSTEE FORECLOSURE SYSTEM

Colorado, like most states, follows the lien theory under which mortgages, trust deeds, or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property are deemed a lien and are not deemed a conveyance. Therefore, the owner of the obligation secured by the lien cannot recover possession of real property without foreclosure and sale. Colo. Rev. Stat. § 38-35-117. Prior to the creation of the public trustee system, Colorado, in step with all other trustee or non-judicial states, utilized a private trustee system for foreclosures wherein the trustees functioned at the lenders' direction. At the 1894 Colorado General Assembly, a bill was proposed to eliminate the deed of trust foreclosure system and move to a judicial foreclosure system. This bill was specifically rejected by the Colorado legislature. However, in that same year, the Colorado General Assembly created the public trustee system to replace the private trustee system. Willis Carpenter, *A Brief History of Colorado's Public Trustee System (1894-2002)*, The Colorado Lawyer, pg. 72 (Feb. 2002). The Colorado public trustee system has been in place ever since. The intent of Colorado's legislators in creating a public trustee system with one public trustee for each of the sixty-four counties in Colorado was that the trustee would

no longer work at the direction of the lender, but rather, would be a neutral third party government employee designated to administer foreclosures in a fair and efficient manner. "[A] bonded, designated and permanent trustee was an attractive alternative to lenders and was equally acceptable to borrowers." *Id.*

While Colorado could have simply eliminated its private trustee system and required foreclosures to be handled through the courts like most of the states on the eastern part of the United States, Colorado specifically elected not to do so. Judicial foreclosure procedures tend to be longer, more expensive and burdensome to the court system. *See Plymouth Capital Co. v. District Court*, 955 P.2d 1014, 1015 (Colo. 1998). In addition, the expenses of long foreclosures become additional debt of the borrower. Accordingly, many western states have opted for non-judicial foreclosures because they offer a balanced and judicially efficient manner for lenders to recover collateral when borrowers default on underlying loans. These western states believe, and statistics confirm, that non-judicial foreclosure procedures encourage lending and economic growth because lenders are more willing to make loans when they are assured they can recover collateral in a timely fashion and foreclosure procedures that are not unduly long result in faster economic recovery after a downturn. As discussed *infra*, the efficient recovery of collateral, in turn, benefits borrowers by providing more accessible credit and higher housing values. While Colorado has had the option multiple times, and even had numerous bills proposed, to utilize the courts

for foreclosure instead of public trustees, the option has always been rejected. Carpenter, *supra*, at 72.

One of the commonalities of any non-judicial foreclosure, whether through a private trustee or Colorado's public trustee system, is the inability of the lender to obtain a judgment against the borrower through the foreclosure process itself. Common law has long recognized the difference between *in rem* and *in personam* claims. "The debt, or the *in personam* claim, consists of the action on the contract. . . . The lien is security for the debt, and the action to claim and foreclose a [mechanic's] lien is an *in rem* action, equitable in nature." *Mountain Ranch Corp. v. Amalgam Enterprises, Inc.*, 143 P.3d 1065, 1068 (Colo. App. 2005). In Colorado, much like other non-judicial foreclosure states that permit deficiency judgments, if a lender wishes to both foreclose on the security and obtain a monetary judgment against the borrower, it must either utilize a judicial foreclosure wherein both claims can be brought simultaneously or it must foreclose its deed of trust through the public trustee and then later initiate a separate action seeking a deficiency judgment. Geoffrey P. Anderson, *Colorado Methods of Practice, 2A Colo. Prac., Methods of Practice* § 75:1 (6th ed. 2018 update); Geoffrey P. Anderson, *Foreclosure Law in Colorado*, First Ed., CLE in Colo., Inc. (Richard H. Krohn, managing editor 2017).

Thus, when a lender elects to utilize the public trustee system in Colorado rather than foreclosing judicially, the lender opts to forgo obtaining a monetary

judgment against the borrower as part of the foreclosure process.

II. THE COLORADO PUBLIC TRUSTEE FORECLOSURE PROCESS

Colorado's well-codified foreclosure process is designed to provide protection for both lenders and borrowers. "It should be noted that the overwhelming success of the public trustee system indicates that it has provided the essential balance of procedural rights between borrowers and lenders. . . ." Carpenter, *supra*, pg. 73. The Colorado non-judicial foreclosure process can be found at Colo. Rev. Stat. §§ 38-38-100.3 *et seq.* and Colorado Rule of Civil Procedure 120 ("Rule 120"). The public trustee process is utilized for both consumer and business loans and employed whether the default under the terms of the loan documents is monetary or non-monetary.

A. THE COLORADO PRE-FORECLOSURE NOTICE

At least thirty days prior to initiating a foreclosure and at least thirty days after a default and only in the case of a monetary default under the terms of a deed of trust, Colo. Rev. Stat. § 38-38-102.5 requires that the holder of an evidence of debt constituting a residential mortgage loan, or the holder's loan servicer or other person acting on the holder's behalf mail a notice addressed to the original *grantor of the deed of trust*

(emphasis added) at the address in the recorded deed of trust or other lien being foreclosed and, if different, at the last address shown in the holder's records. The notice must contain three pieces of information:

> (a) The telephone number of the Colorado foreclosure hotline;
>
> (b) The direct telephone number of the holder's loss mitigation representative or department; and
>
> (c) A statement that it is illegal for any person acting as a foreclosure consultant to charge an upfront fee or deposit to the borrower for services related to the foreclosure.

Colo. Rev. Stat. § 38-38-102.5(2). This notice required by section 102.5 is referred to herein as the "Pre-Foreclosure Notice."

B. INITIATING THE FORECLOSURE

According to Colo. Rev. Stat. § 38-38-101, when the holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder of the evidence of debt or its attorney must file with the public trustee of the county where the property is located, several documents, including, among other documents:

> (a) A notice of election and demand for sale (NED);
>
> (b) The evidence of debt, including any modifications to the original evidence of debt (in some

cases the original evidence of debt is required and in others cases a copy is required);

(c) The original recorded deed of trust securing the evidence of debt;

(d) A combined notice (except that the combined notice may be omitted with the prior approval of the public trustee);

(e) A mailing list;

(f) the name of the loan servicer, if applicable;

(g) the name and address of the current owner of the property.

Colo. Rev. Stat. § 38-38-101(1).

C. THE NOTICE OF ELECTION AND DEMAND FOR SALE

Colo. Rev. Stat. § 38-38-101(4) details the information that must be contained in an NED filed with the public trustee. An NED must contain the following information:

(a) The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

(b) The name of the holder of the evidence of debt;

(c) The date of the deed of trust being foreclosed;

(d) The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;

(e) The amount of the original principal balance of the secured indebtedness;

(f) The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;

(g) A legal description of the property to be foreclosed;

(h) A statement of whether the property described in the notice of election and demand is all or only a portion of the property then encumbered by the deed of trust being foreclosed;

(i) A statement of the violation of the covenant of the evidence of debt or deed of trust being foreclosed upon which the foreclosure is based;

(j) The name, address, business telephone number, and bar registration number of the attorney for the holder of the evidence of debt; and

(k) A description of any changes to the deed of trust described in the notice of election and demand that are based on an affidavit filed with the public trustee.

Colo. Rev. Stat. § 38-38-101(4).

No later than ten business days following the receipt of the NED, the public trustee is required to review the documents filed pursuant to section 38-38-101(1) and, if the filing is complete, cause the NED to be recorded in the office of the county clerk and recorder of the county where the property described in

the NED is located. The public trustee must also set the sale date between 110 and 125 days from the recordation of the NED for non-agricultural property and between 215 and 230 days from the recordation of the NED for agricultural property. Colo. Rev. Stat. § 38-38-108.

D. THE COMBINED NOTICE

No more than twenty calendar days after the public trustee records the NED, the public trustee is required to mail a Combined Notice to the persons set forth in the mailing list. (The Combined Notice gets its name because it is the combination of the formerly separate Notice of Sale and Notice of Rights to Cure and Redeem.) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, the public trustee shall again mail the Combined Notice to the persons as set forth in the most recent amended mailing list, or if no amended mailing list has been provided, to the persons on the mailing list.

The Combined Notice must contain the following information:

(a) The information required by section 38-38-101(4) which identifies the deed of trust being foreclosed;

(b) The statement: A notice of intent to cure filed pursuant to section 38-38-104 shall be filed with the officer at least fifteen calendar days prior to the first scheduled sale date or any date to which the sale is continued;

(c) The statement, which must be in bold: If the sale date is continued to a later date, the deadline to file a notice of intent to cure by those parties entitled to cure may also be extended;

(d) The statement: A notice of intent to redeem filed pursuant to section 38-38-302 shall be filed with the public trustee no later than eight business days after the sale;

(e) If applicable, the date to which the sale has been continued;

(f) The date of sale;

(g) The place of sale;

(h) The statement that the lien being foreclosed may not be a first lien; and

(i) A statement that, if the borrower believes that a lender or servicer has violated the requirements for a single point of contact in section 38-38-103.1 or the prohibition on dual tracking in section 38-38-103.2, the borrower may file a complaint with the Colorado attorney general, the CFPB, or both, but the filing of a complaint will not stop the foreclosure process. The notice must include contact information for both the Colorado attorney general's office and the CFPB.

Colo. Rev. Stat. § 38-38-103(4)(a). Along with the Combined Notice, the public trustee must send legible copies of the relevant statutory sections describing the Colorado statutory right to cure and right to redeem that various parties may have to those on the mailing list. In addition to the two required mailings of the Combined Notice, no more than sixty calendar days

nor less than forty-five calendar days prior to the first scheduled date of sale (unless a longer period of publication is specified in the deed of trust), the public trustee will commence publication of the Combined Notice for four weeks, which means publication once each week for five consecutive weeks. Colo. Rev. Stat. § 38-38-103(5).

E. THE RULE 120 NOTICE

Due to the fact that the public trustee facilitating the foreclosure is a government official, in order to afford borrowers their due process rights, Colo. Rev. Stat. § 38-38-105(2)(a) requires that whenever a public trustee forecloses upon a deed of trust, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to Colorado Rule of Civil Procedure Rule 120 (Rule 120) or other rule of the Colorado Rules of Civil Procedure and present it to the public trustee no later than noon two business days before the sale date. Colo. Rev. Stat. § 38-38-105(2).

Rule 120 requires that when an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, the person entitled to enforce the deed of trust must file a verified motion in a district court seeking such order. In addition to the motion being filed with the court, Rule 120(b) requires that the holder of the evidence of debt issue a notice of response deadline stating:

> (1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;
>
> (2) the right of any interested person to file and serve a response including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response;
>
> (3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and
>
> (4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt a representative authorized to address loss mitigation requests.

Colo. R. Civ. P. 120(b).

A copy of Rule 120 must be included with or attached to the Rule 120 Notice. The Rule 120 Notice must be served by the holder of the evidence of debt

not less than fourteen days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute.

The Rule 120 Notice must be served (by mailing) on the grantor of the deed of trust, the current record owner of the property to be sold, all persons known or believed by the moving party to be obligated on the debt secured by the deed of trust, those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust; and those persons whose interest in the real property may otherwise be affected by the foreclosure. Colo. R. Civ. P. 120(b).

Colorado's Rule 120 process was originally enacted to assist in the determination of the military status of debtors, in compliance with what is now called

the Servicemembers' Civil Relief Act, 50 U.S.C. § 3953. *See generally Goodwin v. Dist. Court*, 779 P.2d 837, 840–42 (Colo. 1989) (summarizing history of the rule and its construction by Colorado Supreme Court). But in light of *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), which held that constitutional due process required a judicial hearing before prejudgment garnishment of wages, in 1976, Rule 120 was expanded. The 1976 amendments to Rule 120 expanded the scope of Rule 120 to include the Rule 120 court making a determination if there was a reasonable probability of the existence of a default. Frederick B. Skillern, *Foreclosure Law in Colorado*, 87–88, First Ed., CLE in Colo., Inc. (Richard H. Krohn, managing editor 2017); *see also Goodwin* at 840–41. The scope of Rule 120 was expanded again in 2018 to be consistent with case law and now requires judicial review of not just the debtor's military status and the reasonable probability of the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust, but also whether the moving party is the real party interest and whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law. Colo. R. Civ. P. 120(d)(1).

F. THE BID AND THE FORECLOSURE SALE

No later than noon two business days prior to the sale date, the holder of the evidence of debt or its attorney must submit a written bid to the public trustee. Colo. Rev. Stat. § 38-38-106 provides a statutory form.

The holder of the evidence of debt is directed to bid at least the holder's good faith estimate of the fair market value of the property being sold, less the amount of unpaid real property taxes and all amounts secured by liens against the property being sold that are senior to the deed of trust or other lien being foreclosed and less the estimated reasonable costs and expenses of holding, marketing, and selling the property, net of income received; except that the holder need not bid more than the total amount due to the holder. Colo. Rev. Stat. § 38-38-106(6). Colorado law specifically provides that the failure of the holder of the evidence of debt to bid as described in section 106(6) does not affect the validity of the sale, but may be raised as a defense by any person sued on a deficiency. Any funds tendered at the sale are deposited with the public trustee and held by the public trustee until the expiration of all redemption periods and then are disbursed by the public trustee.

While the bid submitted to the public trustee pursuant to the Colorado foreclosure statutes may state or preserve a deficiency, a deficiency judgment is not entered and should a lender elect to pursue a deficiency judgment, a separate action must be brought. *See Bank of Am. v. Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994).

ARGUMENT

A. THE PLAIN LANGUAGE OF FDCPA SUPPORTS THE CONCLUSION THAT NON-JUDICIAL FORECLOSURE IS NOT DEBT COLLECTION

FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. In defining "debt collector," the FDCPA draws a distinction between entities that primarily engage in "the collection of any debts," and entities that primarily engage in the "enforcement of security interests." 15 U.S.C. § 1692a(6). Entities that engage in the collection of any debts are "debt collectors" subject to the FDCPA for all purposes. Entities that primarily engage in the enforcement of security interests are only subject to FDCPA when their conduct involves "[t]aking or threatening to take any non-judicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest; there is no present intention to take possession of the property; or the property is exempt by law from such dispossession or disablement." 15 U.S.C. § 1692f(6). The factors identified in 15 U.S.C. § 1692f(6) are not at issue in this case. Thus, in the absence of the factors outlined in section 1692f(6), the enforcement of security interests does not fall within the definition of debt collection.

While many courts have found that foreclosure in certain situations may constitute debt collection, there

is an obvious distinction between judicial foreclosure and non-judicial foreclosure. In judicial foreclosures, the lender may obtain a monetary judgment against the borrower and simultaneously enforce a security interest or the lender may opt to only enforce the security interest in a judicial foreclosure. Where a monetary judgment is sought against the debtor in that instance, a judicial foreclosure action may be subject to FDCPA. However, if a judicial foreclosure is employed solely as an *in rem* action to recover the secured property without a corresponding *in personam* judgment on the note, the FDCPA is not implicated. Likewise, in non-judicial foreclosures, where the lender does not obtain a monetary judgment against the borrower and is only enforcing a security interest, the FDCPA is inapplicable. For this reason, all of the decisions from various circuits concerning judicial foreclosure which include an *in personam* judgment are inapposite for purposes of this case. Under FDCPA, "debt" is defined as an "obligation . . . of a consumer to pay money." 15 U.S.C. § 1692a(5). "The purpose of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Ho v. ReconTrust Company, N.A.*, 858 F.3d 568, 571 (9th Cir. 2017). Thus, non-judicial foreclosure, by its very nature, does not constitute debt collection under the FDCPA as it is enforcing a security interest and recovering collateral as opposed to debt collection. *Diessner*, 618 F.Supp.2d at 1198. The *Ho* Court was correct when it found that "[t]he most plausible reading of the statute is that [the] foreclosure notices were the enforcement of a security interest as contemplated by section 1692f(6) rather than "debt collection" as

contemplated by section 1692a." *Ho* at 572. The same is true of Colorado non-judicial foreclosure. By the plain language of FDCPA, law firms handling non-judicial foreclosures are not engaged in debt collection.

This separation between a collection action and an enforcement action against a security interest is not new in the context of federal law. In fact, in enacting the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*), Congress recognized the distinction between debt collection and enforcement of a security interest. For example, the discharge injunction of 11 U.S.C. § 524(a)(2) enjoins creditors from commencing or continuing any act to collect, recover or offset any debt as personal liability of the debtor post-discharge. There is no corresponding prohibition against secured creditors with valid security interests pursuing *in rem* relief to enforce their liens against the property post-discharge. *See* 11 U.S.C. § 524(j).

In *Johnson v. Home State Bank*, this Court held that "[a] mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. However, such a discharge extinguishes *only* 'the personal

liability of the debtor.'" *Johnson v. Home State Bank*, 501 U.S. 78, 82–83, 111 S.Ct. 2150, 2153 (1991) (internal citations omitted). The Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. *Id.* at 83.

The same principle applies here – the creditor holding a secured interest has two remedies: collecting the debt from the borrower and enforcing the security interest. While obtaining a judgment against the borrower personally would be debt collection, a non-judicial foreclosure seeking enforcement against the security interest only is not debt collection and the FDCPA is not applicable.

B. NONE OF THE NOTICES THAT ARE REQUIRED FOR A COLORADO PUBLIC TRUSTEE FORECLOSURE ARE A DIRECT OR INDIRECT DEMAND FOR PAYMENT

1. THE COLORADO PRE-FORECLOSURE NOTICE IS NOT A DEMAND FOR PAYMENT

The Petitioner incorrectly states in his brief that "[a] non-judicial foreclosure directly attempts to collect a debt by threatening the foreclosure itself. The pre-foreclosure notices declare a default, provide information on how to cure that default, and lay out the devastating consequence of failing to pay – losing one's home. With or without an express demand for payment, the message is unmistakably clear. Consumers

are often left to cobble together any available funds to stave off foreclosure, and the notices serve as an obvious demand for payment." Pet. Br. pg. 12.

The Pre-Foreclosure Notice is clearly not a direct or indirect demand for payment. The Pre-Foreclosure Notice is quite simply a notice designed to direct homeowners to housing counselors and/or the lender's loss mitigation department and to alert homeowners to foreclosure scams disguised as foreclosure consultation or assistance programs.

It is important to note that the focus of the Pre-Foreclosure Notice is upon the "grantors" of a deed of trust. The Pre-Foreclosure Notice must be addressed and sent to "grantors" under the subject deed of trust, who have granted an interest in the real property that is the subject of the foreclosure to the public trustee rather than to the obligors on the debt. Oftentimes, one or more of the grantors are not obligors on the debt instrument. The grantors of a deed of trust are the record owners of the secured property or non-owner spouses at the time the deed of trust is executed; they are not necessarily synonymous with the individuals or entities that are obligating themselves to repay the debt.[2] A demand for payment would only be sent to those obligated on the debt. However, Colorado law specifically requires the Pre-Foreclosure Notice to be directed to

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[2] For example, when two spouses own the property, but only one is obligated on the debt secured with the property or when a parent who does not own the property co-signs the loan for a child and is thus obligated on the debt.

grantors under the deed of trust rather than to obligors on the debt.

2. THE NOTICE OF ELECTION AND DEMAND FOR SALE IS NOT A DEMAND FOR PAYMENT

The NED is a notice to the public that the public trustee has initiated a foreclosure action with respect to the deed of trust identified in the NED. The NED is not mailed or served; it is simply recorded in the public records, by the public trustee, to put the public on notice of the pending sale. The NED does not demand that anybody pay the amount owed. The NED states the original and current principal balance due on the debt to assist parties with an interest in the subject property in determining if there may be equity in the property that would make filing an intent to redeem beneficial. The NED describes the deed of trust being foreclosed, identifies the grantors of the deed of trust, identifies the property that is to be sold, identifies the current holder of the evidence of debt and describes the violation of the deed of trust that has triggered the public trustee's power of sale, which may be a monetary default or a non-monetary default. Colo. Rev. Stat. § 38-38-101(4). Further, the recording of the NED is initiated by the public trustee, not the law firm representing the foreclosing holder of the evidence of debt.

3. THE RULE 120 NOTICE IS NOT A DEMAND FOR PAYMENT

Like the Pre-Foreclosure Notice, the NED and the Combined Notice mailed and published by the public trustee, the Rule 120 Notice is not a demand for payment. The Rule 120 Notice advises the obligors on the debt, grantors of the deed of trust, junior lien holders and other interested parties that a motion requesting an order authorizing sale has been filed with the court, that a response deadline has been set on the motion and that if parties wish to file a response, they must do so by the deadline. Similar to the Combined Notices, the Rule 120 Notice is sent to multiple parties that are not obligated on the debt and is merely advising interested parties of their rights. The language in the Rule 120 Notice is mandatory. There is absolutely no direct or indirect demand for payment.

C. FORECLOSURE IS A MATTER OF STATE LAW

As evidenced by the fact that every state has its own unique process, foreclosure is a matter of state law. This Court has repeatedly held that real estate title and foreclosure are matters of state law and that to displace state regulation in this area, the legislative purpose must be "clear and manifest." In *BFP v. Resolution Trust Corp.*, this Court stated that "[f]ederal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations

in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 144 S.Ct. 1757, 1764–65 (1994) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 539–540 (1947), quoted in *Kelly v. Robinson*, 479 U.S. 36, 49–50, n. 11, 107 S.Ct. 353, 360–362, n. 11, 93 L.Ed.2d 216 (1986)). This Court has consistently held that the security of the titles to real estate is a state concern and that "the power to ensure that security [of titles to real estate] inheres in the very nature of state government." *BFP* at 544 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 204 (1911)).

In *Nobleman v. American Sav. Bank*, this Court stated that "[i]n the absence of a controlling federal rule, we generally assume that Congress has left the determination of property rights . . . to state law, since such property interests are created and defined by state law." *Nobleman v. American Sav. Bank*, 508 U.S. 324, 329, 113 S.Ct. 2016, 2109 (1993) (citing *Butner v. United States*, 440 U.S. 48, 54–55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979)). The *Nobleman* Court found that "the justifications for application of state law are not limited to ownership interests, but apply with equal force to security interests, including the interest of a mortgagee" including the right to foreclose. *Id.*

Petitioner argues in his brief that "Congress already instructed courts how to resolve any possible incompatibilities in this area: Section 1692n says that

inconsistent state laws are preempted to the extent they provide lesser coverage." Pet. Br. pg. 14. However, following Petitioner's line of reasoning, Colorado lawyers seeking to enforce a security interest pursuant to the public trustee foreclosure laws rather than seeking a money judgment against the borrower would be violating federal law.

As discussed *supra*, Rule 120 is peculiar to Colorado. While most states with a non-judicial foreclosure process do not have any court involvement, because Colorado is the only state to utilize public trustees rather than private trustees, the Rule 120 process provides the due process protections that are essential to citizens. Rule 120 requires: 1) that the notice of response deadline be mailed to numerous parties other than obligors on the underlying debt instrument; and 2) that the notice of response deadline be posted on the front door or other conspicuous place of the subject property. Colo. R. Civ. P. 120(b). Specifically, Rule 120(b) requires that the Notice of Response Deadline be mailed to the grantor(s) of the deed of trust, the current record owner(s) of the property to be sold, all persons known or believed by the moving party to be obligated on the debt secured by the deed of trust, those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust; and those persons whose interest in the real property may otherwise be affected by the foreclosure.

15 U.S.C. § 1692c(b) prohibits debt collectors from communicating about the debt with parties other than the consumer, his or her attorney, and consumer reporting agencies if otherwise permitted by law. In addition, FDCPA mandates that a debt collector must cease all direct communications with the borrower when the collector knows the borrower is represented by an attorney, *see* 15 U.S.C. § 1692c(a)(2).

If FDCPA applies to Rule 120 Notices, which do not seek a monetary judgment from the borrower, it creates the classic catch-22 scenario; a law firm complying with FDCPA's prohibition on communicating with any persons other than the debtor and his or her attorney could not simultaneously comply with the Rule 120 notice requirements. If the law firm does not comply with Rule 120, it cannot move forward with the public trustee foreclosure sale as an order authorizing sale is required prior to the public trustee foreclosure sale. Colo. Rev. Stat. § 38-38-105. Thus, if FDCPA applies to these communications, lenders cannot foreclose through the public trustee system in Colorado, seemingly the result that Petitioner is seeking (and ignoring the fact that he has retained the collateral at the expense of the lender and has been in default since 2009). When viewed in light of the other arguments presented, Petitioner seeks to have this result applied nationwide. This result would fly in the face of this Court's stance on refraining from intervention in state judicial procedures absent "clear and manifest" congressional intent. This result is even more absurd given that Rule 120 and the posting requirement in

particular, were created to provide additional protections for consumers. Further, mandating that Rule 120 Notices comply with FDCPA will result in a "real and unavoidable" conflict in Colorado, just as it has in Michigan. *See Amicus Brief of Michigan Creditors Bar Association Brief, p. 10.* Nothing in FDCPA's legislative purpose provides that it was intended to supplant a state's control over its foreclosure process.

D. PUBLIC POLICY FAVORS NON-JUDICIAL FORECLOSURE

Contrary to statements in the *amicus* brief filed by NAACP Legal Defense and Education Fund, Inc., foreclosure rates in states with non-judicial foreclosure are not significantly higher than in states that permit only judicial foreclosure. *NAACP Amicus Brief, p. 5.* In fact, statistics confirm the opposite is true. According to RealtyTrac (a real estate information company), the top five states with the highest foreclosure rates in September 2018 (in order) were: Delaware, New Jersey, Maryland, Connecticut and Florida. RealtyTrac, https://www.realtytrac.com/statsandtrends/foreclosuretrends/ (website last visited Nov. 11, 2018). Of the top five states, all states utilize judicial foreclosures except Maryland (and Maryland is more properly described as "quasi-judicial" given the control the judiciary has over parts of the foreclosure process). *Id.* Similarly, a study performed by Bankrate found the following ten states topped the foreclosure charts in October 2017: Delaware, New Jersey, Maryland, Connecticut, Illinois,

Ohio, South Carolina, Florida, and New York. Claes Bell, CFA, *Top 10 States for Foreclosure*, Bankrate (Oct. 23, 2017), https://www.bankrate.com/finance/real-estate/top-10-states-for-foreclosure-1.aspx#slide=1. Nine of the ten states with the highest foreclosure rates in 2017 utilize judicial foreclosures. On the other hand, Experian reported that in 2017, the ten states with the lowest foreclosure rates are as follows (in order): South Dakota, North Dakota, Vermont, West Virginia, Montana, Colorado, Idaho, Mississippi, Kansas and Texas. *Do You Live in One of the 10 States With the Lowest Foreclosure Rates in the U.S.*, Experian, https://www.experian.com/blogs/ask-experian/do-you-live-in-one-of-the-10-states-with-the-lowest-foreclosure-rates-in-the-us/ (last visited Nov. 11, 2018). Of the ten states with the lowest foreclosure numbers, seven primarily utilize non-judicial foreclosure procedures.

In a 2012 article, titled *Housing Markets Recover Faster in Non-judicial Foreclosure States, Report Says*, HousingWire wrote that how fast a state recovers from a downturn is linked to whether the foreclosure process is judicial or non-judicial. Kerri Ann Panchuk, *Housing Markets Recover Faster in Non-Judicial Foreclosure States, Report Says*, HousingWire (May 18, 2012), https://www.housingwire.com/articles/housing-markets-recover-faster-nonjudicial-foreclosure-states-report-says. Basing the article on a report issued by Paul Diggle, property economist for Capital Economics, HousingWire stated that "[t]he crux of the report is that non-judicial foreclosure markets are performing better in terms of price stabilization." *Id.* ("Paul Diggle, property economist for Capital Economics, cited data

Friday from the Federal Housing Finance Agency index, showing home price growth in the fourth quarter of 2011 declining 0.3% from the previous quarter within judicial foreclosure states and 2.3% from year-ago levels. On the other hand, home prices grew 0.3% in non-judicial foreclosure states quarter-over-quarter while falling a slight 1.6% over the previous year.") *See also A World of Difference: Recovery in Judicial States vs. Non-Judicial States.* Safeguard Industry Update (Feb. 24, 2016), https://safeguardproperties.com/a-world-of-difference-recovery-in-judicial-vs-non-judicial-foreclosure-states/ (comparing the recovery in Cleveland to Phoenix). Similarly, the Mortgage Bankers Association produced an article in 2016 entitled *ProTeck: Recovery Between Judicial, Non-Judicial Foreclosure States Remains Stark*, which cites to a study by ProTeck, a national valuation company, which compared the economic recovery in numerous cities across the country and found that despite falling foreclosure rates, the difference between states that utilize judicial foreclosures compared to those that minimize court actions is "stark" in terms of recovery rates. Mike Sorohan, *ProTeck: Recovery Between Judicial, Non-Judicial Foreclosure States Remains Stark*, MBA Newslink (Mar. 4, 2016), https://www.mba.org/mba-newslinks/2016/march/mba-newslink-friday-3-4-16/residential/pro-teck-recovery-between-judicial-non-judicial-foreclosure-states.

During 2007, the Colorado Division of Housing reported 39,920 foreclosures filed in Colorado. *Colorado Division of Housing, 2nd Q 2018 Foreclosure Report*, https://www.colorado.gov/pacific/dola/foreclosure-reports-and-statistics (last visited Nov. 11, 2018). During 2008,

the Division reported 39,333 foreclosures filed. The height of the foreclosure rate in Colorado came in 2009, when the Division reported 46,394 foreclosures filed. From 2010 on, the foreclosure rate in Colorado dropped each year from the 2009 high. In 2017, the Division reported 6,680 foreclosures filed in Colorado. The Division has reported that in the first two quarters of 2018, Colorado has seen the lowest number of foreclosure filings since the Division began recording quarterly foreclosure activity. *Id.* According to Experian, as of midway through 2018, Colorado now has the fifth lowest foreclosure volume in the United States. O'Connell, *supra.* While certainly there are numerous factors involved in what drives foreclosure numbers up or down, those who have studied it agree that an efficient foreclosure process results in a faster housing recovery.

CONCLUSION

For the reasons stated above, the Court should affirm the Tenth Circuit's holding that Respondent was not engaged in debt collection for purposes of the FDCPA when it initiated a non-judicial foreclosure to enforce a security interest under Colorado law.

Dated: November 14, 2018.

Respectfully submitted,

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